FOIP FOLIO

MORE REINFORCEMENTS AT OIPC

Welcome to **Sherri Fowler** who has joined our office for a term position as a Portfolio Officer. Sherri has worked in the Access and Privacy field for several years, starting in 2000 as the FOIP and Records Coordinator for the Ministries of Justice and Corrections and Public Safety and several of Justice's associated boards and commissions. In 2006, she began working as a Senior Consultant with the Access and Privacy Branch of the Ministry of Justice and Attorney General—taking a temporary leave from this position to join the OIPC. Sherri is working towards completing the University of Alberta's Information Access and Protection of Privacy (IAPP) Certificate Program. Sherri grew up in Rocanville, Saskatchewan and now lives in Regina with her husband and two young girls. Sherri is excited to be working with the OIPC team!

ANNOTATED SECTION INDEX

The Annotated Section Index posted to our website last month now includes additional features. It includes *The Freedom of Information and Privacy Act* (FOIP), *The Local Authority Freedom of Information and Privacy Act* (LA FOIP), *The Health Information Protection Act* (HIPA) and a special annotated section index for Investigation Report H2005-002. The separate index was prepared because of the unusual nature of that report. As the very first investigation report done by the Office of the Information and Privacy Commissioner (OIPC) on what was then a very new statute, we commented on more than 60 different provisions of HIPA.

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FOIP CONSIDERED BY SASKATCHEWAN PROVINCIAL COURT

On January 26, 2009, **Provincial Court Judge P.S. Kolenick** considered *The Freedom of Information and Protection of Privacy Act* (FOIP) and Regulations. The circumstances were that the accused was charged with offences related to child pornography under the Criminal Code. The Saskatoon Police Service contacted SaskTel and provided them with a document entitled *Request for Account Information Pursuant to a Child Sexual Exploitation Investigation - section 29(2)(g)*. In response, SaskTel provided the following information: ISP subscriber's name, address, telephone number, and email address.

The Saskatoon Police then went to Saskatchewan Government Insurance (SGI) and obtained the accused's date of birth, his operator's licence number, the vehicles in his name and a physical description of the accused. With this information, the police then located the accused's cell phone number and the name of his employer.

Judge Kolenick issued a twelve page written decision to dispose of the accused's arguments on the constitutional issues raised by the Accused (**R.v. Trapp**, 2009 SKPC 005).

The Accused had argued that the disclosure of information by SaskTel violated his section 7 right under the *Charter of Rights and Freedoms* (right not to be deprived of life, liberty and security except in accordance with fundamental justice) and his section 8 right (freedom from unreasonable search and seizure).

The Provincial Court judge dismissed the application and found that neither section 7 or 8 of the Charter had been violated. He found that section 29(2)(g) of FOIP authorized the disclosure that occurred. The court did not address and it was apparently not argued that, by reason of section 3 of FOIP, the name, address and phone number published in the Saskatoon telephone directory would not be subject to FOIP in any event.

SASKATCHEWAN COURT OF QUEEN'S BENCH APPROVES MASKING APPLICANTS' NAMES

Mr. Justice Ottenbreit of the Court of Queen's Bench issued his judgment on March 18, 2009 in a case cited as **Germain v. Automobile Injury Appeal Commission**, 2009 SKQB 106.

In this case, an individual had appealed to the Saskatchewan Automobile Injury Appeal Commission (the Commission) under *The Automobile Accident Insurance Act* from the decision of an SGI adjuster with respect to injuries resulting from a car accident. This individual was concerned with the Commission's past practice of publishing full text decisions on its website, indexed by the name of appellants. These decisions included all kinds of personal information about finances, income, lifestyle, health and healthcare. The individual asked for an injunction to prevent the publication on the Internet or otherwise by the Commission of the results of her appeal. Between the time that the court application was launched (January 2006) and the time Justice Ottenbreit issued his judgment, the Commission changed its policy with respect to Internet publication. In response to our Investigation Report H-2005-001, the Commission adopted a policy in 2008 that provided for masking the names of individuals for purposes of Internet publication. In his conclusion Justice Ottenbreit stated that:

SASKATCHEWAN COURT OF QUEEN'S BENCH APPROVES MASKING APPLICANTS' NAMES—continued

The Commission tendered its new Net Policy to the court shortly before the rehearing of this matter. In my view, given the contents of the policy, it could have been produced long ago. The new policy addresses many if not all of the concerns of the [the Appellant]. *The courts have been editing their judgments for some number of years in cases where there is sensitive information. Unfortunately the Commission's epiphany respecting this issue took some time in coming. Time which resulted in my view probably in needless effort and cost.*

As a result of our Report H2005-001 and other developments across Canada, a number of Saskatchewan administrative tribunals are currently reassessing their approach to Internet publication of personal information. We are now canvassing all administrative tribunals in Saskatchewan to determine exactly what action they are taking to protect the privacy of individuals if they publish their decisions.

The Ottenbreit decision, in our respectful view, includes some commentary that is inconsistent with the approach taken by other Canadian superior courts. For example, he apparently saw no need for differential treatment of publication on the Internet than any other kind of publication. A very different view was taken by Madam Justice Bielby in the Alberta case of **Alberta (Attorney-General) v. Krushell** [2000] A.J. No. 358. Justice Ottenbreit appears to have assumed without significant discussion that the 'open courts' principle applies without modification to administrative tribunals. He suggested that Internet publication would be one of the purposes for collection of health information from appellants and he appears to have been influenced by the practices of a couple of other Saskatchewan administrative tribunals even though there appears to have been no evidence that they factored the risks of Internet publication into their own publication practices. Justice Ottenbreit did not discuss the recent extensive work undertaken by the Canadian Judicial Council in protecting privacy on the Internet and then the recent decision of the Supreme Court of Canada to post a new 'privacy sensitive' policy for the Internet publication of decisions of Canada's highest court. That Supreme Court policy - *Policy for Access to Supreme Court of Canada Court Records* - is now available online at: http://www.scc-csc.gc.ca/court-cour/rec-doc/pol-eng.asp#s1. In addition, there is an extensive resource list on the question of Internet publication by administrative tribunals on our website under the *Resources* tab.

CHIEF ELECTORAL OFFICE RECOMMENDATIONS

Saskatchewan's **Acting Chief Electoral Officer (CEO), David Wilkie**, tabled in the Assembly his report – *Recommendations for Changes to The Election Act, 1996.* The Acting CEO noted that "The matter of the privacy of names on the Voters' List has become more of an issue with the public. It was raised by the voting public both during the 26th General Election and after the election." He notes that existing Saskatchewan legislation does not state that any voter data cannot be used for any purpose other than an electoral purpose. He also indicates that Alberta and Ontario have stronger privacy protection for voter information. Alberta, British Columbia, Manitoba and Quebec all have significantly heavier penalties for offences related to misuse of voters' information. Our office supports those recommendations and joins with the Acting CEO in urging legislative change to better protect the privacy of Saskatchewan residents.

RIGHT TO KNOW WEEK—CULLITON AWARD NOMINATIONS

As in previous years, the Right to Know Committee is seeking nominations for the ***Chief Justice E.M. Culliton Right to Know Award*** (the Culliton Award). Last year's winner for excellence in promoting access to information was the **Saskatoon Health Region**. The winner in 2007 was the **Health Quality Council.**

Nomination Guidelines

To be eligible to compete for the Culliton Award, the organization must be a Saskatchewan government institution (provincial, government ministry, Crown corporation, board, commission or agency) or a local authority (regional health authority, municipality, library, school, university or college). The nominee should be an agency that has demonstrated some or all of the following qualities:

- Leadership in promoting public access to the agency's information;
- Creativity in building public awareness of access to information;
- Excellence in orientation of, and service training in, employee access to information responsibilities; and/or
- Innovation in the development of tools to promote or facilitate access to information.

The deadline for nominations is September 15, 2009. Nominations can be self-initiated or third party and each nomination should include:

- A letter of nomination (up to 1,000 words), and
- Samples of materials relevant to the nomination (testimonials or other material.)

The award will be presented during Right to Know Week. Nominations should be sent to the Right to Know Steering Committee, c/o 503 – 1801 Hamilton Street, Regina, SK, S4P 4B4 or fax 306.798.1603 or e-mail sdashney@oipc.sk.ca.

A Bit of History

The intent of the award is to celebrate and to recognize leadership in promoting open and accountable government, but just who is the award's namesake, former **Chief Justice E.M. Culliton**?

Edward Culliton was born in 1906 in Minnesota. His family then immigrated to Canada and settled on a farm near Elbow, Saskatchewan. He graduated from the University of Saskatchewan, was accepted into the Saskatchewan Bar in 1930, and established his law practice in Gravelbourg, Saskatchewan. Throughout his illustrious career, Culliton was elected to the Legislative Assembly, selected by Premier Patterson in 1938 to serve as Provincial Secretary, and was the Liberal finance critic until he left politics in 1951 when he was appointed to the Saskatchewan Court of Appeal. As well, he was a member of the Canadian Army, fighting overseas during World War I, and in 1952 he was appointed by Premier T.C. Douglas to serve as chair of the Saskatchewan Golden Jubilee Committee.

In 1962 he took on the position of Chief Justice for Saskatchewan and assumed this role until he retired in 1981. After his retirement, Culliton was

CULLITON AWARD NOMINATIONS—continued

mandated by former Attorney-General, Roy Romanow, to determine whether or not Saskatchewan should develop an access and privacy law. He concluded that such legislation should be developed for the prairie province, which resulted in the current FOIP and LA FOIP laws in 1992 and 1993 respectively. It was this historic undertaking that made former Chief Justice E.M. Culliton the ideal candidate when the inaugural Saskatchewan Right To Know committee named the award. Former Chief Justice E.M. Culliton died on March 14, 1991. *(Photo courtesy Saskatchewan Archives Board, R-B7904)*

WINNIPEG HEALTH FACILITIES TO POST OUTBREAK ALERTS

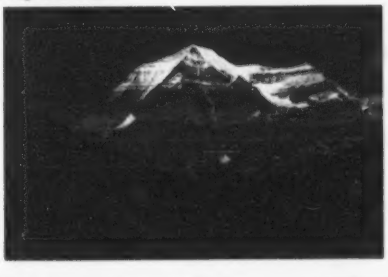
The *Winnipeg Free Press* (April 27, 2009) reports that Winnipeg hospitals and personal care homes will soon post public safety alerts about outbreaks of highly contagious viruses and antibiotic-resistant superbugs. As a result of a freedom of information access request it was learned that more than 1400 people were infected with potentially harmful illnesses like norovirus, methicillin-resistant staphylococcus aureus, C. difficile, and vancomycin-resistant entercocci in the last two years. Formerly, the Winnipeg Regional Health Authority did not make hospital outbreak information publicly available. On the other hand, hospitals in Ontario can post outbreak notices online in a searchable database, along with their monthly hospital infection rates. As a result of the access request it was learned that 18 outbreaks of serious illnesses were reported in Winnipeg hospitals between 2006 and 2008, infecting 803 patients and 609 hospital staff with explosive diarrhea, projectile vomiting and hard-to-treat skin infections.

BRITISH COLUMBIA 'BIG OPT-OUT' CAMPAIGN

The **British Columbia Freedom of Information and Privacy Association** (FIPA) has joined with the BC Civil Liberties Association and the BC Persons with AIDS Society to push for changes to the e-health initiative in that province. Their campaign is focused on achieving three things:

- Right of every British Columbian to determine for themselves whether or not to participate in e-Health by giving or withholding informed consent.
- Right of every British Columbian who decides to consent to participate in eHealth to determine the degree of their participation through record-level disclosure directives.
- The implementation of a substantial and widespread information campaign informing all British Columbians about e-Health, their rights, and how to exercise those rights.

More information is available at www.bcoptout.ca.



SUPREME COURT & GARBAGE DECISION

You will likely have heard already about the recent Supreme Court of Canada decision dealing with whether the homeowner has a privacy interest in bags of garbage placed near his property line awaiting municipal garbage collection. The Supreme Court held that there was no reasonable expectation of privacy in the circumstances of that case from Alberta. Notwithstanding the specific decision, the discussion of privacy and section 8 of the Charter is the most up-to-date statement by our highest court of the importance of privacy and that it is constitutionally protected. The Court is clear that until garbage is placed at or within reach of the lot line, the householder retains an element of control over its disposition. It could not be said to have been unequivocally abandoned if it is placed on a porch or in a garage or within the immediate vicinity of a dwelling. On the facts of this case, the Court concluded that the homeowner abandoned any interest he had in the bag because of where he placed it. You can access the full decision at **R. v. Patrick**, 2009 SCC 17.

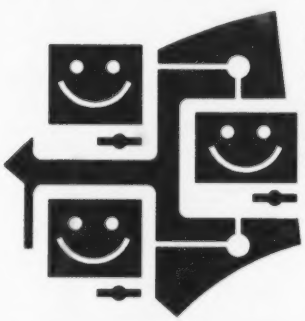
FACEBOOK AND TERMS OF USE

A recent experience with a change to the terms of service or terms of use of Facebook may have caused some to pay more attention to the terms of the contract they enter into with Facebook. Facebook had announced a unilateral change to its terms of use such that it could make copies of content generated by users to facilitate the posting and retention of that content on the website. Once discovered, there was a dramatic online backlash from users. This led to a reversal by Facebook and it reverted to the original terms of use. All social network users should make sure they read and understand the terms of service before they post anything to their site.

NO PRIVACY FOR FACEBOOK POSTINGS

A recent Ontario court decision is a timely reminder that if you are making a claim for damages for personal injury the insurer's lawyers will likely have no difficulty in obtaining access to any relevant information you have posted on your Facebook site. This is so regardless of any privacy settings you have selected. The issue for the courts is one of relevancy not privacy. The citation is **Leduc v. Roman**, [2009] O.J. No. 681.

SOCIAL NETWORKING & GENERATION Y: PRIVACY MATTERS, RIGHT?



There is an interesting article by **Erin Power** in newsletter of the **Sheldon Chumir Foundation for Ethics in Leadership**, the Chumir Ethics Forum, Vol. 9, No. 3 available online at www.chumirethicsfoundation.ca. She considers the disconnect between Gen Y-ers understanding of the dangers posed by Internet postings and their behaviour online.

NEWFOUNDLAND & LABRADOR COMMISSIONER CRITICAL OF EXECUTIVE COUNCIL RESPONSE TO ACCESS REQUEST

Newfoundland and Labrador Information and Privacy Commissioner Ed Ring disagreed with a number of exemptions claimed by Executive Council in response to an access request for a review of the Inland Fisheries and Wildlife Enforcement Program. He considered the 'advice and recommendations' exemption, the 'law enforcement' exemption and the 'information received in confidence' exemption and found them not applicable. Commissioner Ring also found that the Executive Council failed to participate meaningfully in the informal resolution process by not responding to inquiries from the Commissioner's office in a timely manner, despite repeated attempts to solicit their involvement. The Report A-2009-003 dated February 9, 2009 is available online at www.oipc.gov.nl.ca.

SOME INTERESTING ONTARIO ORDERS

Ontario's Information and Privacy Commissioner Office has issued some interesting recent orders. Three in particular are noteworthy. Order PO-2764 involved the target of an access request seeking the identity of the requester. In this case, given that the requester was an individual operating a competitor company, **Assistant Commissioner Brian Beamish** held that the identity of the requester was business, not personal information and ordered it disclosed. In Order PO-2765, **Adjudicator Frank DeVries** ordered the disclosure of the majority of three Privacy Impact Assessments completed for the Ministry of Health and Long-Term Care. Order PO-2774 deals with a request to the Ontario Lottery and Gaming Corporation for the Probability Accounting Report (PAR) sheet for two slot machine games used at Ontario casinos. PAR sheets contain information about the design of the slot machines such as payback percentages, hit frequency, number of symbols per reel, winning combinations, etc. **Adjudicator Daphne Loukidelis** rejected the manufacturer's argument that this information was exempt under the third party commercial exemption and ordered the PAR sheets disclosed. All of these Orders are available at www.ipc.on.ca.

CANADIAN ANTI-SPAM BILL INTRODUCED

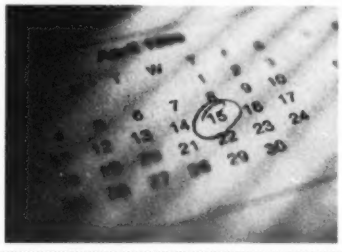
In April, the Industry Canada Minister tabled the *Electronic Commerce Protection Act* (ECPA) in Parliament. According to **Minister Tony Clement**, "The proposed Electronic Commerce Protection Act (ECPA) will deter the most dangerous forms of spam, such as identity theft, phishing and spyware, from occurring in Canada and will help drive spammers out of Canada." This bill will allow businesses and consumers to take civil action against anyone who violates the EPCA. It will allow offenders to be charged with monetary penalties of up to $1 million for individuals and $10 million for all other offenders. More information is available at www.ic.gc.ca/eic/site/icl.nsf/eng/0495.html.

TWO BROWN BAG LUNCHEONS REMAINING—REGISTER NOW!

May 27, 2009 – OIPC Brown Bag Workshop: ***Duty to Assist*** – 503-1801 Hamilton Street. To register contact Aaron Orban at 798-4155 or e-mail: aorban@oipc.sk.ca.

June 16, 2009 - OIPC Brown Bag Workshop: ***Third Party Notice & Intervention*** – 503-1801 Hamilton Street. To register contact Aaron at 798-4155 or e-mail: aorban@oipc.sk.ca.

Participants may join the sessions via conference call as long as arrangements are made with Aaron ahead of time. This program has been designed for FOIP Coordinators, Privacy Officers and others working for trustee or public sector organizations.



MARK YOUR CALENDAR FOR FUTURE EVENTS!

May 31-June 3, 2009 - e-Health 2009: ***Leadership in Action*** – Quebec City, Quebec
(visit http://www.e-healthconference.com/ for more details)

June 10-12, 2009 – University of Alberta: ***Access and Privacy Conference 2009*** – Edmonton, Alberta
(visit http://www3.extension.ualberta.ca/accessandprivacy/ for more information)

September 28—October 2, 2009: *Right to Know Week 2009—Regina and Saskatoon*

November 30—December 1, 2009: *Prairie Health Information Privacy Day 2009*—Calgary, Alberta
(visit http://www.verney.ca/phipd2009 for more information)

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